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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-19

PAULEY PETROLEUM INC., COLORADO OIL AND GAS CORPORATION, MESA PETROLEUM CO., MCCULLOCH OIL CORPORATION OF CALIFORNIA, HUSKY OIL COMPANY OF DELAWARE and MACDONALD OIL CORPORATION,

Petitioners,

—against—

THE UNITED STATES OF AMERICA, J. M. HUBER CORPORATION, MIDWEST OIL CORPORATION, ASHLAND OIL & REFINING COMPANY, KEWANEE OIL COMPANY and FOREST OIL COMPANY,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

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September 21, 1979

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Note on Citational Conventions

In this Reply Brief the following citational conventions are used:

"A-#" refers to pages of "Petitioners' Appendix of Decisions" dated July 3, 1979;

"Gov't Br. #" refers to pages of the "Brief of the United States in Opposition" dated September 1979;

"Pet. #" refers to pages of Petitioners' "Petition for a Writ of Certiorari" dated July 3, 1979;

"Stat. App. #" refers to pages of "Petitioners' Statutory Appendix" dated July 3, 1979; and

"Px" and "Dx" refer to trial exhibits of plaintiffs and the Government, respectively.

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PETITIONERS' REPLY BRIEF

Petitioners Pauley Petroleum Inc. ("Pauley"), *et al.* submit this brief reply memorandum in further support of their petition for a writ of certiorari to review the decision of the United States Court of Claims in *Pauley Petroleum Inc.* v. *United States*, 219 Ct. Cl. ——, 591 F.2d 1308 (1979) (A-1-35).*

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* "A-#" refers to pages of "Petitioners' Appendix of Decisions" filed with their petition for a writ of certiorari dated July 3, 1979. Other citational conventions used herein are described in a note following the "Table of Authorities", *supra*.

I.

The Government, in Effect, Concedes Error by the Court of Claims in Its Application of 5 U.S.C. § 552 (a)(1); A Summary Remand for Further Proceedings Would Be Appropriate.

The first point of our petition did not attack, as the Government suggests (Gov't Br. 9-10), the abstract power of the Department of the Interior to take "unusual" administrative steps in the wake of the Santa Barbara Channel oil spill of late January 1969. Rather, it challenges the Department's competence lawfully to do so, through the so-called "clearance procedure", in secrecy and without the articulation and publication of the measurable standards which alone distinguish arbitrary whim from "discretion". The Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (1976) (Stat. App. 5-6), denies adverse effect to such an undisclosed regulatory device, and the Court of Claims erred, placing itself in conflict with decisions of this Court and several courts of appeals, by declining to so hold (Pet. 37-46).

The Court of Claims recognized that, in the absence of the Government's plea that the plaintiffs below had not passed the "clearance procedure", "we might have a different case" (A-27 n.26), *viz.*, a vindication of plaintiffs' leasehold rights, rather than a total destruction of the investment value of the $74,000,000 they paid into the Treasury. Nevertheless, the Government, in its answering brief, has not attempted either to refute petitioners' analysis in its own terms or to sustain the Court of Claims' appreciation of and application of 5 U.S.C. § 552(a)(1) (1976). Thus, the Government all but concedes that the court below erred as to a potentially dispositive issue—and did so in a way

which introduces into the law an undesirable uncertainty with respect to the meaning of a central provision of the APA.

The Government's tack is to seek to dismiss the error of the court below as, in effect, a harmless error. Like almost any party to a large case, the Government had many arguments below. Somewhere in the grabbag, it suggests, there is one which would produce victory without regard to the Court of Claims' misapplication of 5 U.S.C. § 552(a)(1) (1976).

The candidates it nominates for this honor cannot, we submit, bear the assigned burden.

(A) The Government implies (Gov't Br. 12) that plaintiffs below had "actual notice" of the "clearance procedure", pointing to the finding of the Trial Judge that they knew of the correspondence in March and April 1969 which the Government's trial witnesses, almost two years later, identified as elements of the "procedure". But the Government can point to no disclosure, other than in the trial record, of the procedural dimensions of the "procedure" and to none, there or anywhere else, of its wholly undocumented substantive terms. Most importantly, the Court of Claims did not find the existence of "notice" within the meaning of 5 U.S.C. § 552(a)(1) (1976). It spoke, instead, of petitioners' alleged ability to "obtain information if they had pressed" (A-28 n. 27). This raises, not the question of "notice", but of "availability", an issue which the court below resolved improperly and in conflict with the teachings of *Morton* v. *Ruiz,* 415 U.S. 199, 231-32 (1974), and the holdings of *Appalachian Power Co.* v. *Train,* 566 F.2d 451, 456 (4th Cir. 1977) and *Northern California Power Agency* v. *Morton,* 396 F.Supp. 1187, 1191-92 (D.D.C. 1975), *aff'd w/o opinion,* 539 F.2d 243 (D.C. Cir. 1976).

(B) The Government suggests that petitioners' application for a drilling permit "was not approved" by reason of its failure to conform to OCS Order No. 10 (Gov't Br. 10), which the Department promulgated over six weeks after the application's submission and its consignment by the District Engineer to (as he put it in August 1969) "the file with the rest of the notices that are being held in abeyance" (Px 537). But the Government can point for support only to a finding of the Trial Judge which says:

> "Plaintiffs' application for a permit to drill Well No. 2 on Tract 384 has not been approved by the District Engineer because he lacks authority without a clearance of the tract, and in any event it does not comply with the provisions of OCS Order No. 10." (A-317)

The point, of course, is that a substantive deficiency, if any,* in the permit application should have eventuated, as such events had done before the spill (A-116-17), in its rejection for a disclosed reason, *see* 5 U.S.C. §§ 555(e), 558(c) (1976) (Stat. App. 9-11), and its concomitant resubmission in whatever form the Department indicated in such rejection was due. This would have happened, of course, if the Department had been prepared, in principle, to countenance further exploratory drilling in the politically sensitive mid-Channel area seaward of the City of Santa Barbara and had not been using the standardless and undisclosed "clearance procedure" to refuse any consideration of drilling in that sector of the Channel.

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* The Trial Judge's Report makes no finding as to the nature or materiality of the asserted discrepancy nor did the Government propose one. It is, in the record, simply a conclusory assertion by the District Engineer who had been deprived, by reason of the "clearance procedure", of the authority to function administratively on the application. *See also* Pet. p. 29 n. *.

(C) The Government also urges (Gov't Br. p. 8) that plaintiffs' reluctance to drill in the circumstances of March 1969 and their initiation of suit in April of that year (*id.* at 11) excuses the Department's performance with respect to nondisclosure of the "clearance procedure" and its inaction on plaintiffs' permit application. It goes so fas as to suggest that petitioners conceded this analysis below. (*Id.* at 8-9) The concession is imaginary (*see, e.g.,* pp. 102-03 of plaintiffs' Exceptions, reproduced as Exhibit A hereto) and the underlying analysis is unsound for the reasons there set forth. Petitioners and their co-lessees sought the right to drill in the manner prescribed in the Department's published regulations, and, by reason of the unpublished "clearance procedure", never received a response or, indeed, administrative action of any kind on that request.

(D) Finally, the Government points to the trial testimony of its witnesses that it did grant some "clearances" for exploratory drilling under its secret "procedure" in 1969, thus rebutting any claim that "the clearance procedure was a bureaucratic facade to conceal a departmental decision to shut down drilling operations altogether" (Gov't Br. 11). But the Government does not presume to explain—here anymore than it did at trial—why, despite these "clearances" in remote sections of the Channel, the Department systematically refused to act on the "clearance" of leases in the politically sensitive mid-Channel area where plaintiffs' parcels are located or why, during 1969 and 1970, it also declined to function, not only on plaintiffs' permit application, but on many others for wells in the same area. (*Compare id. with* Pet. Ex. B; Pet. 20-21.) It is precisely the susceptibility of an unpublished, standardless procedure to arbitrary abuse of the kind evident in the record which led Congress to deny effect to such "procedures" in 5 U.S.C. § 552(a)(1) (1976).

In any case, the Government's "even if" arguments need not burden this Court. Their significance can only be fairly assessed in the light of a proper application to this record of 5 U.S.C. § 552(a)(1) (1976), which has not yet been done. The "clearance procedure"—and the Department's asserted right to apply it against petitioners and their co-lessees—is the fulcrum on which liability *vel non* as to breach of contract turns. Here the Court of Claims' misapplication of the APA has, for all practical purposes, been acknowledged by the Government.

It would be appropriate, in such circumstance, for this Court to grant the petition and, at the same time, to vacate summarily the decision below, remanding for further proceedings which take into account 5 U.S.C. § 552(a)(1) (1976) as it was written by Congress, has been interpreted by this Court, and has been applied by several courts of appeals. *See, e.g., United States* v. *Bodcaw Co.*, 99 S.Ct. 1066 (1979) *(per curiam)*; *Harrah Independent School Dist.* v. *Martin*, 99 S.Ct. 1062 (1979) *(per curiam)*; *Western Oil & Gas Ass'n* v. *Alaska*, 439 U.S. 922 (1978); *NLRB* v. *Baylor University Medical Center*, 439 U.S. 9 (1978) *(per curiam)*; *INS* v. *Bagamasbad*, 429 U.S. 24 (1976) *(per curiam)*.

II.

The Government's Efforts to Minimize the Choice-of-Law Issue Posed Under OCSL Act § 4(a)(2) Are Unsound.

The Government seeks to dismiss as "abstract" (Gov't Br. 13)—and thus, presumably, as unimportant—the choice-of-law issue which lies near the heart of petitioners' alternative "frustration" claim. But the Government's address only confirms the significance of that issue both to this case and to the legal regime of the Outer Continental Shelf.

Even now the Government is unable or unwilling to state the content of the standard of spill liability it thinks has existed on the OCS since February 1969 and from where that standard comes.

It says "the state of the law on lessees' liability was plainly unsettled prior to February 1969" (Gov't Br. 15). But it does not explain why the precise contours of that prior law are critical *if* the terms of Secretary Hickel's regulations applied thereafter and are significantly different, as they plainly are, from all possible alternative sources of prior law.

The Government also says "the state of law remained unsettled even after the February 21 regulation was issued" (*ibid.*). But this can be so only if (1) one credits the Court of Claims' "doubt", contrary to *Union Oil Co.* v. *Morton*, 512 F.2d 743, 748 (9th Cir. 1975), that the Secretary cannot apply his regulations to pre-existing leases or (2) the Secretary cannot validly regulate at all so as to displace "adopted" State law in this area. The latter is precisely the question this Court should decide. The Secretary's desire to oust State law if he could—and to do so in absolutist terms alien to anything this side of the Price-Anderson amendments to the Atomic Energy Act—is manifest on the face of the February regulation (quoted at Pet. 22-23) and in his many commentaries on that regulation.

Finally, the Government turns to the Department's further regulatory amendments of August 1969, which refer oil spill liability to "applicable law", contending the effect "was to leave the law on liability to third parties for damages exactly where it was at the time petitioners entered their leases" (Gov't Br. 15). But the Government's argument has not come, as it seems to think, full circle. Now the "applicable law" depends for its applicability, not upon "adoption" pursuant to OCSL Act § 4(a)(2), 43 U.S.C.

§ 1333(a)(2) (1976) (Stat. App. 21-22), but upon prescription by the Secretary. And, if he has the competence to so prescribe—which we assert and ask this Court to decide—then the "applicable law" also includes all of the relevant regulatory changes of August, which sought to perpetuate, in even more expansive form, the absolutist requirements first announced in February. The Government's "no-change" thesis can be valid only if the applicability of California law on the Santa Barbara Channel OCS never was affected by Secretarial regulations.

The "uncertainty" which is said, both by the Court of Claims and by the Government, to inhere in the questions of liability standards posed by this case is only "uncertainty" about the scope of the Secretary's power to oust the State law which is otherwise "adopted" as federal law by OCSL Act § 4(a)(2). It is exactly this "uncertainty" which ought to be addressed by this Court—for the sake of both petitioners and the many thousands of others who *now*, and for the foreseeable future, will operate on or be affected by activities on the OCS.

If the "no-change" thesis disappears—as it would if this Court were to decide that the Secretary's regulatory exertions of 1969 were not a *brutum fulmun*—then the Government's other objections to "frustration" also fall away or are sufficiently impaired as to warrant their reassessment below. Thus, the Government points to drilling at Santa Barbara in 1969 and thereafter by the selected few allowed to pass the undocumented "clearance procedure" and says that the concerns expressed by petitioners as to liability were "subjective", not "objective". (Gov't Br. 14-15) But this "subjectivity", if it depends on a view of the law unshared by the Government trial counsel and others, is scarcely damning if the view is found to be objectively correct when it is finally assessed.

The Government has sought throughout this case to finesse the question of what the Secretary of the Interior accomplished when he promulgated his sweeping liability regulations in 1969. We think that he radically changed the liability standards applicable to spills on the OCS and "frustrated" petitioners' lease contracts. Whether we are right or not depends upon a construction of OCSL Act § 4(a)(2) of such significance to all activity on the OCS that this Court now should make it.

CONCLUSION

The petition prayed should issue so that the APA can be affirmed, the scope of the Secretary's rule-making power under the OCSL Act clarified, and injustice to petitioners rectified.

Respectfully submitted,

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EXHIBIT A

cooperate with your department and if we can be of further assistance please feel free to contact us at this office."

Exception to Finding 78(k) (at page 134)

Pauley's Pursuit of Clearance

While plaintiffs contend, and believe, that they are entitled, as their Petition asserts, to a restitutionary remedy by reason of the Government's "frustration" of the lease contracts through the imposition of absolute liability, the final portions of this Finding are in error to the extent that they suggest that, after April 4, some further "pursuit" of either "clearance" or of a drilling permit was in order.

In the case of the permit application, Pauley had filed it in accordance with the published and long-accustomed procedures of the *Code of Federal Regulations* and, at Solanas' suggestion, also had contemporaneously telegraphed an appeal to Secretary Hickel. (*See* pp. 38-45, *supra.*) In the case of the "clearance procedure", no such "procedure" was disclosed to plaintiffs. Pauley had complied on April 3 with a reasonable construction of the only data requests which the Government, for some unexplained purpose, had sent to plaintiffs, and both Pauley (in writing to the regional officials) and Kewanee (in writing to the Secretary) had explicitly offered anything further that the Government desired (Px 556, Dx 168; see also Px 554). (*See* generally pp. 100-01, *supra.*)

At the same time plaintiffs were making these tenders, they were being confronted with repeated public statements by the Secretary of the Interior announcing "shutdown order[s]" (Px 609), that drilling and production "will remain shut down indefinitely" (Px 871), and his enthusiasm for "self-determination against drilling" (Px 610 at p. 1). All of these pronouncements patently applied to plaintiffs' leases, among others. When plaintiffs took the Secretary

at his apparent word and filed, on April 9, 1969, a Petition in this Court which charged the Government with halting their drilling (Claims III and IV) and demanding relief, the Government made no effort to advise them that they were laboring under a misunderstanding—that they had not been "shut down" and that the submission of a few more papers would do the trick.[57]

The reason this was not done, we submit, is because the submission of a few more papers under the unannounced "clearance procedure" would not have done the trick. It is plain that in 1969 and 1970 Secretary Hickel had no plans for an orderly and early resumption of drilling at Santa Barbara. He chose to respond, not to the requirements of the Government's contracts, but to a popular clamor for "self-determination against drilling" (Px 610 at p. 1).

Supplementation to Finding 80 (at page 136)

Oil Spill Liabilities

This Finding accurately describes the collapse, following the Union Oil episode, of the market for liability insurance for oil companies involved in offshore oil spills. It does, however, require supplementation.

Finding 80(b), which describes Pauley's liability coverage, also should note, for the sake of clarity, that the other members of Pauley's lessee group also had liability insurance to cover their ratable shares of claims at Santa

[57] It is significant that when the Government filed its Answer to the Petition in July 1969 it did not mention the "clearance procedure", although the "procedure" described by the Government's witnesses at trial plainly was a matter which, under the Court's Rules, should have been pleaded as an affirmative defense. We mention this not to raise a technical pleading point—it is far too late in the case for that—but to bring to the Court's attention another indication that the "procedure" which the Government's witnesses described to the Trial Judge was a bureaucratic sham, a contrived after-thought.